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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 850

BENJAMIN BERNSTEIN, PETITIONER

v.

ABRAHAM A. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 1a-21a) is reported at 192 F. Supp. 138. The opinion of the Court of Appeals (Pet. App. 23a-31a) is reported at 299 F. 2d 248.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1962. The petition for a writ of certiorari was filed on April 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1954 amendment to Section 203 of the Social Security Act, 42 U.S.C. 403, making earnings from the self-employed practice of law a basis for deductions from future benefits, is applicable to persons who became eligible for benefits prior to its enactment.

2. Whether, if the 1954 amendment does apply to such persons, it violates the Fifth Amendment in that it deprives those persons of vested property rights without due process of law.

3. Whether income from a business with regard to which the beneficiary has not performed "substantial services" is includible as part of his "earnings" for the purpose of determining deductions from benefits under Section 203 of the Social Security Act.

STATUTES INVOLVED

The pertinent provisions of Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. (1952 ed., Supp. V) 401, *et seq.*, are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

Petitioner was employed as a law clerk until September of 1951 (Pet. App. 1a–2a). At that time, at the age of 65, he began to receive monthly payments of $68.50 as Old Age Insurance Benefits pursuant to the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. 401, *et seq.* (Pet. App. 1a–2a).[1] In September of 1951 petitioner began to practice law as a

[1] By virtue of the 1954 amendments to the Act, petitioner's monthly benefits were increased to $88.50 (Pet. App. 24a).

self-employed attorney; and he carried on this practice through 1955 and 1956 (Pet. App. 2a). During these years, he also was a silent partner in a partnership doing business as the Infanta Knitting Mills (*Ibid.*). He exercised no voice in the conduct of the partnership and took no part in its operations, but received a share of its net profits (*Ibid.*). In 1955 petitioner's net earnings from his law practice were $1,030.50, and, in addition, he received some $37,000 from his share in the knitting mill (*Ibid.*). In 1956 he earned $4,604.60 from his law practice, plus income from the knitting mill (*Ibid.*).

On March 1, 1957, petitioner was notified by the Bureau of Old Age and Survivors Insurance that deductions were being imposed against the benefits paid to him in 1955 and 1956 (except for those paid for the month of August 1956) in the full amount of the benefits paid. The reason given was that his earnings during those years had exceeded the permissible amounts under the Act (Pet. App. 2a). Petitioner was instructed to refund the benefits which he had received in those years. Dissatisfied with the determination of the Bureau, petitioner sought and received a hearing before a Referee of the Social Security Administration. The Referee concluded that petitioner was obligated to refund the benefits received in 1956, but that no deductions should have been imposed for the year 1955 (Pet. App. 3a).

Petitioner subsequently requested review by the Appeals Council of the Social Security Administration, which had already decided, on its own motion, to re-examine the decision of the Referee (Pet. App.

3a). Petitioner argued before the Appeals Council that the 1954 amendment to the Act, making earnings from the self-employed practice of law (where substantial services have been performed) a basis for deductions from benefits, was not intended by Congress to apply to persons like petitioner, who had received an award of benefits prior to 1954. Petitioner urged that if the 1954 amendment did apply to such persons, the amendment violated the Due Process Clause of the Fifth Amendment in that it deprived these individuals of vested property rights (Pet. App. 3a).

Petitioner also contended that, in any event, the imposition of deductions in 1955 had not been authorized because, as he read the statute, only such earnings as were derived from a trade or business in which the beneficiary performed substantial services were to be considered in calculating deductions (Pet. App. 3a). Under this interpretation the Administration could consider only the $1,030.50 that petitioner earned in his law practice in 1955, and not the $37,000 net income which he received as partnership income. The Appeals Council reversed the Referee as to the year 1955, concluding that the provisions of the Act required the imposition of deductions in that year as well as in 1956 (Pet. App. 3a–4a). In all other respects, the Referee's decision was affirmed.

Petitioner thereafter brought this suit for judicial review of the Secretary's decision, raising the same contentions that he argued in the administrative proceedings. The district court, in a lengthy opinion,

entered summary judgment in favor of the Secretary (Pet. App. 22a). The court of appeals affirmed. The court of appeals pointed out that it had recently held, in *Price* v. *Flemming*, 280 F. 2d 956, certiorari denied, 365 U.S. 817, that the 1954 amendment to the Social Security Act does apply to persons who received their award of benefits before its effective date, and that, in doing so, the statute is not unconstitutional since the Social Security System does not embody concepts of "accrued property rights." The court also noted in this latter respect that the *Price* decision was itself based on a very recent decision of this Court in *Flemming* v. *Nestor*, 363 U.S. 603. Finally, the court ruled that the administrative agency had properly construed the statute in concluding that petitioner's partnership earnings, as well as his earnings from the practice of law, were to be taken into account in determining whether his benefits were subject to deductions in 1955.

ARGUMENT

This petition raises issues of statutory construction which have been resolved against petitioner by the administrative authorities and the two courts below. The rulings on these issues are plainly correct and do not require further review by this Court. See *Price* v. *Flemming*, 280 F. 2d 956 (C.A. 3), certiorari denied, 365 U.S. 817. Petitioner's apparent constitutional argument—that rights acquired under the Social Security Act are contractual in nature and may not be altered by Congress—was recently considered and rejected by this court in *Flemming* v. *Nestor*, 363 U.S. 603.

1. At the time petitioner began to receive Old Age Insurance Benefits, and until January 1, 1955, a self-employed attorney's earnings from his practice were neither "covered" under the Social Security Act for benefit purposes, nor deductible from benefits otherwise payable under the Act. 42 U.S.C. (1952 ed.) 411, 403(b). In 1954, Section 203 of the Act was amended so as to make earnings from the self-employed practice of law deductible from any benefits payable. 42 U.S.C. (1952 ed., Supp. V, 1958 ed.) 403 (b), (c), 411 (a), (c).

Petitioner's suggestion that, as a matter of statutory construction, the 1954 amendment to Section 203 of the Social Security Act is inapplicable to persons whose entitlement to benefits accrued before the effective date of the amendment[2] is untenable. The statute itself leaves no doubt that Congress intended the new deduction provisions to be applicable with respect to all future benefit payments, regardless of when their recipient first became entitled to benefits. The new provisions, to the extent here relevant resulted from the amending of subsection (b)(1) and (c) of Section 203 of the Act. With respect to subsection (b)(1),[3] the Act specifically provides that the 1954 amendment "shall be applicable in the case of monthly benefits under title II of the Social Security Act for months in any taxable year (of the individual entitled to such benefits) beginning after December

[2] This same argument also was made in the petition for certiorari in *Price* v. *Flemming*, 1960 Term, No. 630, at pp. 4–8. See also p. 12, fn. 6, of the brief in opposition in that case. Certiorari was denied in *Price*, 365 U.S. 817.

[3] These provisions are reprinted in the Appendix, *infra*, pp. 11–13.

1954." 68 Stat. 1077. Since no specific provision is made as to the effective date of the amendment to subsection (e), it is encompassed by the stipulation in the Act that the "remaining amendments [to Section 203] * * * shall be applicable, insofar as they are related to the monthly benefits of an individual which are based on his wages and self-employment income, in the case of monthly benefits under such title II for months in any taxable year (of such individual) beginning after December 1954 * * *." 68 Stat. 1077. The Act thus plainly makes *all* monthly benefits payable after January 1, 1955, subject to the amended deduction provision, and leaves no room for the limited application urged by petitioner.[5]

The amendment in question marked a change of congressional policy. In promulgating it, Congress was seeking to eliminate the "anomaly" in the existing law whereby individuals who worked in "non-covered" employment and self-employment were, regardless of their earnings, permitted to draw full insurance benefits. See H. Rep. No. 1698, *supra*, at p. 21. The new provisions achieved the equitable result of making all income received by an individual relevant in determining his entitlement to insurance

[5] This congressional intent, as expressed in the Act, is mirrored by the legislative history of the 1954 enactment. Thus, House Report No. 1698, 83d Cong., 2d Sess., p. 70, points out that "the amendments made with respect to deductions from an individual's benefits because of his own earnings shall be applicable in the case of monthly benefits for months in any taxable year (of the entitled individual) beginning after December 1954." See also S. Rep. No. 1987, 83d Cong., 2d Sess., 1954, U.S. Code Cong. and Admin. News, p. 3780.

benefits. In view of the remedial objectives of the amendment, it is obvious that Congress had every reason to make subject to its provisions persons, like petitioner, who, while they had already qualified for benefits, would be claiming them on a monthly basis in 1955 and future years.

2. Petitioner apparently also contends that the application of the 1954 amendments to persons who were awarded benefits prior to their enactment violates the Due Process Clause of the Fifth Amendment in that it deprives such individuals of their already existing "right" to benefits. The court of appeals was clearly correct in rejecting this argument in reliance upon its prior decision in *Price* v. *Flemming*, 280 F. 2d 956 (C.A. 3), certiorari denied, 365 U.S. 817, which was, in turn, based upon this Court's holding in *Flemming* v. *Nestor*, 363 U.S. 603.

3. Finally, the Social Security Administration correctly determined, as the courts below held, that petitioner's 1955 benefits were subject to deductions under the 1954 amendments. In 1955, petitioner rendered substantial services in each month in the self-employed practice of law, but his earnings therefrom were less than $1,200 (Pet. App. 2a). In the same year he also received earnings considerably in excess of $2,080 from his partnership share in the knitwear mill, for which he performed no services. (*Ibid.*)

Under the 1954 amendment, deductions from benefits because of earnings are to be made (up to the total amount of the benefits) with respect to any month in which the beneficiary is "charged" with earnings. 42 U.S.C. 403(b)(1) (App., *infra*, p. 11).

Where the beneficiary's annual earnings exceed $1,200, the excess above that figure is "charged" at the rate of $80 per month, first to the last month of the taxable year and then to each preceding month. 42 U.S.C. 403 (e)(2), (App., *infra*, pp. 11–12). Accordingly, if annual earnings exceed $2,080, it is possible for every month to be so "charged," with the result that the year's benefits are extinguished.

"An individual's earnings for a taxable year" are defined to include "his net earnings from self-employment for such year." 42 U.S.C. 403(e)(4)(A) (App., *infra*, p. 13). These in turn are defined so as to include earnings from the self-employed practice of law. 42 U.S.C. 403(e)(4)(B), 411(a), (e) (App., *infra*, pp. 13–14) and from a share in a partnership, with certain exceptions not applicable here (*ibid.*).

Finally, petitioner does not come within the exception of 42 U.S.C. 403(e)(2)(D) (App., *infra*, p. 12) which specifies that no deduction shall be made in any month "in which such individual did not engage in self-employment * * *." An individual is "presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month *with respect to any trade or business* the net income or loss of which is includible in computing * * * his net earnings or net loss from self-employment for any taxable year. * * *" 42 U.S.C. 403(e)(3)(B) (App., *infra*, pp. 12–13). (Emphasis added.) Thus, where the beneficiary did render substantial services during a month in *any* trade or business (as petitioner did in the prac-

tice of law), the net income of which was includible in determining his net earnings from self-employment (as was true of petitioner's earnings from the practice of law), the exceptive provisions formed by subsections (e)(2)(D) and (e)(3)(B)(i) are made inoperative, and Section 203(e)(1) applies with full force with regard to all "earnings" attributable to the month.[5]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1962.

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[5] Even if the Act was ambiguous in its import, the decision of the Administration, as the district court noted, represents an "administrative construction of the Act, and regulations thereunder, which is entitled to great weight, and is not to be overturned unless clearly wrong, or unless a different construction is plainly required." (Pet. App. 12a; see also, Pet. App. 30a). See *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Association*, 310 U.S. 534, 549.

APPENDIX

Section 203 of the Social Security Act, 42 U.S.C. (1952 ed., Supp. V) 403, provides, in pertinent part:

* * * * *

(b) *Deductions on account of work or failure to have child in care.*

Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, until the total of such deductions equals such individual's benefit or benefits under section 402 of this title for any month—

(1) in which such individual is under the age of seventy-two and for which month he is charged with any earnings under the provisions of subsection (e) of this section; * * *.

* * * * *

(e) *Months to which earnings are charged.*

For the purposes of subsections (b) and (c) of this section—

(1) If an individual's earnings for a taxable year of twelve months are not more than $1,200, no month in such year shall be charged with any earnings. If an individual's earnings for a taxable year of less than twelve months are not more than the product of $100 times the number of months in such year, no month in such year shall be charged with any earnings.

(2) If an individual's earnings for a taxable year of twelve months are in excess of $1,200, the amount of his earnings in excess of $1,200 shall be charged to months as follows: The first $80 of such excess shall be charged to the last month of such taxable year, and the

balance, if any, of such excess shall be charged at the rate of $80 per month to each preceding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied. If an individual's earnings for a taxable year of less than twelve months are more than the product of $100 times the number of months in such year, the amount of such earnings in excess of such product shall be charged to months as follows: The first $80 of such excess shall be charged to the first month of such taxable year, and the balance, if any, shall be charged at the rate of $80 per month to each preceding month in such year to which such charging is not prohibited by the last sentence of this paragraph, until all of such balance has been applied. Notwithstanding the preceding provisions of this paragraph, no part of the excess referred to in such provisions shall be charged to any month (A) for which the individual whose earnings are involved was not entitled to a benefit under this title, (B) in which an event described in paragraphs (2), (3), (4), or (5) of subsection (b) of this section occurred, (C) in which such individual was age seventy-two or over, or (D) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (4) of this subsection) of more than $80.

(3)(A) * * *.

(B) For purposes of clause (D) of paragraph (2) of this subsection—

(i) An individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in para-

graph (4) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

(ii) An individual will be presumed, with respect to any month, to have rendered services for wages (determined as provided in paragraph (4) of this subsection) of more than $80 until it is shown to the satisfaction of the Secretary that such individual did not render such services in such month for more than such amount.

(4)(A) An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year, minus (ii) any net loss from self-employment for such year.

(B) In determining an individual's net earnings from self-employment and his net loss from self-employment for purposes of subparagraph (A) of this paragraph and subparagraph (B) of paragraph (3) of this subsection, the provisions of section 411 of this title, other than paragraphs (1), (4), and (5) of subsection (c) of this section, shall be applicable; * * *.

* * * * * *

Section 211 of the Social Security Act, 42 U.S.C. 411, provides, in pertinent part:

§ 411. *Definitions relating to self-employment:* For the purposes of this subchapter—(a) *Net earnings from self-employment.*

The term "net earnings from self-employment" means the gross income, as computed under chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual, less the deductions

allowed under such chapter which are attributable to such trade or business, plus his distributive share (whether or not distributed) of the ordinary net income or loss, as computed under section 183 of Title 26, from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary net income or loss—

(1) There shall be excluded rentals from real estate and from personal property leased with the real estate * * *;

(2) There shall be excluded dividends on any share of stock, and interest on any bond, debenture, note, or certificate, or other evidence of indebtedness, issued with interest coupons or in registered form by any corporation * * *;

(3) There shall be excluded any gain or loss * * * which is considered * * * as gain or loss from the sale or exchange of a capital asset, * * *;

* * * * *

(b) *Self-employment income.*

The term "self-employment income" means the net earnings from self-employment derived by an individual (other than a nonresident alien individual) during any taxable year beginning after 1950; * * *.

* * * * *

(c) *Trade or business.*

The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 23 of Title 26 * * *.

* * * * *